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Governor's Task Force on Workers' Compensation Reform

To the Honorable Governor Mark Sanford, the General Assembly, and the Citizens of South Carolina,

On July 26, the Governor's Workers' Compensation Reform Task Force was established. This task force was made up of business representatives, attorneys, insurance industry representatives, and physicians. In addition, the group received resources from the Department of Insurance, the Department of Commerce, and administrative guidance from the Governor's Office.

It is my pleasure to present our report. I would like to express my extreme thanks to the business leaders and citizens who served on this task force. While we didn't always agree on the mechanism for reform, it is quite evident that every member is dedicated to the improvement of any process or system that will make South Carolina the best state possible.

The long hours of deliberative debate and the additional hours in sub-committee meetings made this process much easier. In addition to numerous meeting times, the task force spent hours soliciting input from all sectors of the population to get the best recommendations possible.

I have been honored to serve with this distinguished group of professionals.

The task force also had the privilege of receiving input from several experts in the field of workers' compensation who helped identify and explain both the workers' compensation process and the ramifications of some of our initial recommendations. The Chairman of the Workers' Compensation Commission and the executive director of the commission offered valuable input into our deliberations and offered themselves as subject matter experts. Their input also helped facilitate our discussions and subsequent recommendations.

The task force was established to recommend improvements to the overall system of workers' compensation in the state of South Carolina.

The specific areas addressed include the:

- dramatic rise of workers' compensation premiums
- current awards review process
- current decision and appeals process
- service delivery and data collection operation
- Workers' Compensation Advisory Committee

These issues are important when considering their long-term impact on the state. In June 2005, the National Council on Compensation Insurance (NCCI) recommended a 32.9 percent increase in the advisory lost costs used by insurers to set workers' compensation insurance rates. Only weeks later, the director of the Second Injury Fund announced another 38 percent increase in year-to-year statewide assessments, based on loss rates from the previous year. In actuality, this 38 percent increase was considerably higher (more than 100%) in some cases.

With operating costs continuing to go up for businesses in our state, these increases represent a heavy burden on existing business and a very serious concern in recruiting new business to the state. At one time, South Carolina ranked among the best in the nation in workers' compensation insurance rates. However, South Carolina does not now fare as well. South Carolina currently ranks about average in rates when compared with other states, but projections suggest that the ranking will continue to decline unless we institute cost curbing reform.

The job of this task force is not to point fingers or find blame. Our job and deliberations focus on the root causes of recommended increases and what parts of the system need improvement. The common cry that "the system is broken" is not warranted. However, every good system must continuously improve to continue operating effectively. We offer our recommendations with that mindset of continuous improvement.

As we found in our discussions, the workers' compensation system in South Carolina is very complex. It is not a system copied from other states, so comparisons were not always possible or applicable. As we studied the major foundation and components of the system, our knowledge increased significantly. However, due to time constraints the task force was unable to study the system at the level of detail we would have liked. We focused on issues that will have the most impact on both improving the system by reducing costs and protecting injured workers in South Carolina.

These findings and recommendations are offered in the spirit of continuous improvement for the workers' compensation system and the state of South Carolina, both now and in the future. Some of the recommendations may be difficult to implement. We hope our state leaders will address these issues so that existing businesses can continue to operate successfully, new businesses can develop, statewide economic growth will prosper, and our citizens may enjoy the quality of life South Carolina now offers.

Sincerely,

Lewis Creel
Chairperson

Task Force Members

Committee Members

Ms. Kirsten Barr	<i>Attorney, Trask and Howell LLC</i>
Mr. David Brewster	<i>Department Supervisor for Health, Safety, and the Environment, The Timken Company</i>
Mr. Lewis Creel	<i>Director, Human Resources, Health and Safety Alcoa – Mount Holly</i>
Mr. Preston McDaniel	<i>Attorney, McDaniel Law Firm</i>
Mr. Michael Raby	<i>Owner and President, Raby Construction</i>
Mr. Tim Reynolds	<i>President, Accident Insurance Company</i>
Mr. John Seibert	<i>President, Capital City Insurance Company</i>
Mr. Tim Timmons	<i>Associate Vice-President of Workplace Relations South Carolina Chamber of Commerce</i>
Dr. Boyce Tollison	<i>Physician, Palmetto Baptist Hospital</i>
Mr. Clif Scott	<i>Legal Counsel, Association of Counties</i>
Mr. Avery Wilkerson	<i>Agent, Keenan and Suggs</i>

Ex-Officio Members

Mr. Marshall Evans	South Carolina Office of the Governor
Ms. Eleanor Kitzman	South Carolina Department of Insurance
Mr. Bernard Tisdale	Ogletree, Deakins, Nash, Smoak & Stewart
Ms. Kim Varnadoe	South Carolina Department of Commerce

Administrative Guidance

Ms. Sandy Yates	South Carolina Office of the Governor
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Mission Statement and Goals

On July 26, 2005,

**Governor Mark Sanford established a
Workers' Compensation Reform Task Force
comprised of business representatives, attorneys,
insurance representatives, and physicians.**

**The task force was charged with
making recommendations to improve the overall system
of workers' compensation and study areas to
include, but not limited to:**

the dramatic rise in Workers' Compensation premiums

the current awards review process

the current decision and appeals process

the service delivery and data collection operation

*current oversight of workers' compensation to include a review of the existing
advisory committee*

**The task force, designated the Governor's
Workers' Compensation Reform Task Force,
was asked to complete its work and report all
recommendations by January 1, 2006.**

Executive Summary

The members of the Workers' Compensation Task Force put their ideas and perceived problems with the workers' compensation system on paper and identified sixty-seven issues for discussion. The task force then placed the issues into one of four categories: Insurance, Legal, Medical, and Commission. (Refer to Appendix B. List of Initial Issues)

The task force established subcommittees to investigate each of the issues. The subcommittees researched and met in small groups and brought their research, analysis, and recommendations before the full task force. The task force either voted to approve, approve with amendment, deny, or make no recommendation for each issue. While all input was important, the task force voted no recommendation on issues that lacked adequate information.

In order to utilize appropriate resources and efforts for those issues that will have the most immediate and significant impact on cost and to meet the mission of the task force, the task force recommends the following issues should receive the most immediate focus.

A. Second Injury Fund

The Second Injury Fund must be abolished in an orderly fashion. The fund was created to serve a noble purpose and has served that purpose well. However, that need has passed. The Second Injury Fund no longer serves its intended purpose and does not fairly represent all businesses in South Carolina. In 2004, of the 98,000 employers in the state of South Carolina, less than 2,000 received any benefits from the fund.

B. Appeals Process

Under the current workers' compensation appeals process, a single commissioner hears each case. If the case is appealed, then a panel of three commissioners hears the case. This peer review process of appeals provokes fairness issues for both sides of the appeal.

The task force recommends a hearing panel of commissioners dedicated solely to appeals. These dedicated appeals commissioners, who may have served as field commissioners in the past, should become proficient in the workers' compensation system and provide an appellate system that will eliminate the appearance of the "rubber stamp," while giving field commissioners more time to prepare and hear cases.

Implementation of this recommendation includes the addition of four new commissioners. The chair of the commission should handle day-to-day operations and serve on the appellate panel in the absence of one of the other appellate commissioners. Seven commissioners would continue to hear cases. While this adds cost to the commission budget, the return on investment will be profound. In addition to appellate issues, hearing commissioners need to have additional time to prepare for and hear cases. This would undoubtedly speed up the process of getting cases heard adequately and in a

timely fashion. The data reviewed clearly indicate that expenses increase exponentially when claims are delayed.

C. Award Standards

A significant number of issues addressed were directly related to the inconsistency and unpredictability of awards by commissioners. The instability and unpredictability of the system plays a major role in the increased number of cases with attorney involvement. Using a standardized approach to determining awards would ensure more stability and predictability while reducing costs.

The task force recommends that the commission use the American Medical Association (AMA) or other professional, medically recognized guidelines to establish awards. The use of these guidelines should be included in required training for any doctor who works with workers' compensation claims in the state of South Carolina. Any additional award, above and beyond guidelines, should only be permitted if there is a standardized approach, such as calculations that take age, education, location etc. into account.

D. Repetitive Trauma

The Workers' Compensation Act must include a clear definition of repetitive trauma. The Act was put into place to aid a worker injured in an on-the-job accident. The system has eroded into not just paying for the worker's injury but, in many cases, paying for issues simply related to the natural aging process. Injuries must be defined as only those occurrences where a traumatic event or unusual strain is identified by the time and place of occurrence caused by a specific event during a single work shift.

E. Total and Permanent Presumption/Back Impairment Rating

The task force recommends the elimination of the presumption that if the back has an impairment rating of 50 percent, then the employee receives total and permanent disability. Many factors play a role in total and permanent disability. The back is the only area where this applies, and it is not reflective of the true disability in many cases. Employees with 50 percent impairment to the back are able to do many jobs without receiving a decision of total and permanent disability.

While other factors such as education and type of job do play a role in this award, an automatic ruling of total and permanent disability is not warranted and continues to drive up workers' compensation costs.

F. Supreme Court Rulings

Several fairly recent South Carolina Supreme Court rulings have contributed to the erosion of the workers' compensation system in South Carolina.

Tiller v. National Health Care

In Tiller, the South Carolina Supreme Court held that a claimant is not required to provide expert witness testimony to prove causation in a medically complex case. Legislation is needed to specify that the burden of proof is upon the claimant and proof of causation in a medically complex case requires expert witness testimony.

Brown v. BiLo

In Brown, the South Carolina Supreme Court held that the Workers' Compensation Act authorizes communication between health care providers and a carrier, employer, or their representatives by written reports only. To discuss the claim with a health care provider, a carrier, employer, or their representatives requires written authorization from the employee. Such authorizations can be, and often are, revoked by the employee on advice of his or her attorney. The carrier or employer must then take depositions from the treating physicians to obtain information necessary to the defense of the claim.

Such depositions add to the costs of defending the claim. In addition, prohibiting carriers, employers, and their representatives from communicating with physicians except by and through written reports can complicate efforts by the employer to return the employee to work within any restrictions the doctor might recommend in an individual case. Such breakdowns in communication work to the detriment of both employers and employees. Legislation is needed that allows physicians to communicate with either side in a workers' compensation case without fear of being sued by the patient for breach of patient-physician confidentiality.

Dodge v. Brucoli

In Dodge, the South Carolina Court of Appeals held that the Workers' Compensation Commission has jurisdiction to order the payment of future medical benefits in any non-settled case when, in the judgment of the commission, such benefits would tend to reduce the claimant's disability. As a practical matter, this means that a future award of additional medical benefits is possible in any claim that is not settled by a clincher. This increases an employer and carrier's potential liability in all non-settled claims and increases the costs of clincher settlements. Legislation is needed to impose reasonable limitations on an employee's right to claim future medical benefits in all but the most serious of injury claims.

G. Workers' Compensation Advisory Committee

The Workers' Compensation Act creates the Workers' Compensation Advisory Committee. A lack of defined responsibilities has kept this committee from being as effective as it could be. The task force recommends that the committee be re-constituted with representation from all constituent groups, including both large and small businesses, plaintiff and defense attorneys, insurance representatives (both carriers and self-insured), and a representative from the medical community. In addition, the committee should include several ex-officio members, including the workers' compensation director, the chair of the commission, Department of Insurance,

Department of Commerce, and Department of Vocational Rehabilitation. Other members should be appointed at the discretion of the Governor.

This committee should have the responsibility and authority to monitor the effectiveness of the commission through input gathered from the community, recommend changes to policies and procedures, and recommend legislative action when the Workers' Compensation Act is not meeting the needs of its customers. This committee would serve as the ongoing process improvement group for the Workers' Compensation Commission.

H. Fraud

Employer and claimant fraud continues to be an issue in South Carolina. While claimant fraud is a serious issue, employer fraud is also a great concern. In South Carolina, insurance fraud, such as intentional misclassification and/or under reporting of payroll, is still considered a misdemeanor. The task force recommends that South Carolina follow the recommendations released by the attorney general in establishing guidelines to prosecute insurance fraud. This is not an effort to penalize the average business person who makes a simple mistake on classification issues. These recommendations are geared toward adequate punishment for those who intentionally abuse the system. That abuse results in costs for businesses going up.

These represent some of the biggest cost drivers in the workers' compensation system.

Additional issues of greatest concern are:

- The addition of a new computer system for the commission will help facilitate data-driven decisions. The continued support of the information technology needs of the commission is essential. This effort is currently under way.
- Fee schedules for outpatient treatment and for pharmacy expenses are currently under review. Fee schedules assist in the standardization of workers' compensation payments, similar to the way inpatient fee schedules currently work. This will also help to bring consistency and predictability in the system.
- The task force also recommends a training and development plan for newly appointed commissioners to facilitate the commissioner's ability to learn about the system and apply the Workers' Compensation Act fairly to injured workers in South Carolina.
- The Department of Insurance has already begun addressing issues surrounding the voluntary market rates versus the assigned risk pool rates. A report of this work is scheduled for December 2005. Work by the established advisory committee at the Department of Insurance to look at many of the issues similar to those tackled by this task force will not be duplicated here.

Committee Reports

Insurance Committee

Issue:

Fraud

Discussion:

Claimant and employer fraud continues to influence the increasing cost of workers' compensation in South Carolina. Most states have laws addressing claimant fraud, but there is limited severity in employer fraud. The attorney general has prosecuted this type of fraud in the past, but confidential settlements have been a problem because they have no deterrent effect. In these fraud cases, the deterrent effect is more important than the fund recovery. Aggressive prosecution of these crimes would serve as a continual deterrent as well.

Fraud should be addressed in any workers' compensation legislation. There is a strong perception that fraud is contributing to the high cost of workers' compensation, and little opposition to any anti-fraud measures would be found. Medicare fraud can be used as an example.

Recently, the Attorney General's Office received \$400,000 in new budget money to combat insurance fraud. While these dollars will help reduce fraud in the system, parameters must exist for how the allocated money can be used and for reporting results.

The reduced number of compliance officers employed with the commission reduces the number of investigations into fraudulent issues as well as the amount of fines, fees, and assessments received by the commission. These fines, fees, and assessments easily pay for the salary and benefits of compliance officers.

Recommendation:

- Develop legislation to help facilitate the investigation and prosecution of claimant and employer fraud.
- Fully fund and staff the Workers' Compensation Commission's coverage and compliance division.
- Adopt the recommendations released by the Attorney General's Office.

Attorney General's Recommendation:

- The Attorney General's Office needs a forensic accountant for the Insurance Fraud Division. Cost: \$100,000 in salary, equipment, and benefits.
- Criminal penalty changes to the insurance fraud statutes in Title 38 of the South Carolina Code should be written. 38-55-530 and 38-55-540.

- Violation of 38-55-540 should be punishable as a felony, where the amount of economic advantage received exceeds \$10,000. A graduated scale determines fines and jail terms as follows:

Economic Advantage Received by Fraud,	Conviction and Jail Term,	Criminal Fine
Up to \$10,000	Misdemeanor (up to 3 years)	Up to \$10,000
\$10,000- \$50,000	Felony (up to 5 years)	Up to \$50,000
\$50,000 or more	Felony (up to 10 years)	Up to \$100,000
Any second violation	Felony (up to 10 years)	Up to \$100,000

- The definition of “economic advantage benefit received” should be changed.
- The definitions of a misrepresentation or false claim should be examined.

Specific examples include:

An employer’s intentional miscount/misclassification of its employees to fraudulently obtain a favorable insurance premium, payment schedule, or other economic benefit; or intentional false reports of business activities.

Issue:

In-state versus out-of-state adjusters

Discussion:

There are frequent problems with out-of-state adjusters who do not know or understand South Carolina workers' compensation law and, therefore, do not apply standards accordingly. This leads to an eventual slow down in the system and the claims process.

Having adjusters in South Carolina is a business decision by the carriers and should not be dictated by the system. While there are licensing and certification issues for adjusters who work in the state system, dictating location of these adjusters is unwarranted.

Problems can be addressed through the implementation of performance standards for insurers and performance management systems for adjusters.

Recommendation:

No action warranted

Issue:

Assigned risk pool rates versus voluntary rates

Discussion:

In some cases, the assigned risk pool rates are not in alignment with the voluntary rates. The assigned risk pool rates, by definition, should be substantially higher than the voluntary rates. Yet that is not always the case.

This Department of Insurance issue is currently being addressed. A 1990 department order is a major reason for the difference in timing of voluntary versus involuntary rates and the method of establishing rates for the assigned risk plan. The new director plans to reach a point that allows assigned risk plan rates to change when voluntary loss costs go into effect.

Recommendation:

Support the Department of Insurance plan to align assigned risk plan rates and voluntary market rates.

Issue:

Review of the National Council on Compensation Insurance (NCCI) as South Carolina's rating agency

Discussion:

A Workers' Compensation Advisory Board was recently appointed through the Department of Insurance. This Board was created pursuant to a budget proviso that will be exploring this issue.

Board members have been appointed, and a report is due from that group in December 2005.

Recommendation:

Defer this issue to the findings of the Workers' Compensation Advisory Board.

Issue:

Placing the Workers' Compensation Commission under the Department of Insurance

Discussion:

The issue of combining the Workers' Compensation Commission with the Department of Insurance was discussed. After a period of time, this issue was tabled because of a lack of information.

Recommendation:

No recommendation was made. If this issue is to be further investigated, we suggest another committee whose members understand the total state reporting scheme to truly appraise the cost versus benefit of this move.

Medical Committee

Issue:

Medical utilization

Discussion:

In South Carolina, employers retain the right to choose their treating physicians. In most cases, employers will select the best, non-biased, medical professional trained in dealing with an employee's work-related injury or illness.

In some cases, when impairment ratings are not as high as the employee deems appropriate, the employee chooses another medical professional who may increase that rating. This practice, known as "doctor shopping," continues to add cost to the system.

While the goal is to ensure employees are properly treated and their impairments compensated, the cost of multiple medical professionals, who may order the same tests, becomes increasingly higher and higher. When in doubt, second opinions should be explored in concert with the treating physician, and test results and diagnosis should be shared between these two medical professionals. This method would respond to the employee's health concerns, add confidence to the system, and reduce the expenditure of unnecessary time and resources.

Recommendation:

The only allowable medical costs to be reimbursed are those authorized by the treating physician.

Issue:

Mental stress disability

Discussion:

Recent rulings suggest the need for clear definition of causation when a mental stress disability is awarded. While some claimed impairments exist that are caused by the job, mental stress because of non-job-related issues should not be awarded. The additional arbitrary rating is driving up the cost of claims and creates many of the permanent total awards. There must be limits, guidelines, and objective measurement of this type of disability.

Recommendation:

The claimant should be required to prove that at least 51 percent of the psychological disability is directly the result of a compensable injury and not outside life issues, such as divorce. An objective medical measurement tool should be used in this assessment.

Issue:

American Medical Association (AMA) guidelines should be strictly used to determine employee impairment ratings

Discussion:

The issue of impairment rating versus disability rating is becoming increasingly arbitrary and needs clearer definition. Issues revolve around the following:

- Does the impairment rating already take into consideration the long-term effect/disability of the injury?
- Should commissioners have discretion to arbitrarily assign a disability rating in addition to a medically prescribed impairment rating?
- Should there be a dual system, one for impairment and one for disability?

The issues require a stronger definition of impairment rating. A guideline such as the current AMA's would add additional consistency.

Strict application of that guideline, or another medically recognized guideline, in determining disability, would bring better definitions and consistency to the system. Currently, medical professionals are not required to be trained in the application of these guidelines. If this proposal were defined in the statute, the result would be a better and continuous training program for the application of the guidelines.

Recommendation:

Wording should be adopted creating a presumption that the treating physician's rating is correct and that this rating should utilize the latest AMA guidelines. To overcome this presumption, there must be a preponderance of objective scientific medical evidence.

Issue:

Fee schedules for inpatient, outpatient, and pharmacy

Discussion:

Fee schedules for inpatient, outpatient, and pharmacy should be established. Currently there is a fee schedule for inpatient services. A team is also working to update the fee schedule for outpatient services. Little work has been done to improve the pharmacy fee schedule.

Pharmacy fee schedules should be a commission process that defines timelines and actions. Constituents should be actively involved in the fee schedule development process.

Updating schedules should be based on a model similar to the Medicare fee schedule process.

Recommendation:

Support the current commission efforts and require the development of a fee schedule for each issue to include timely updates.

Issue:

Define repetitive trauma as an injury versus aging and better define the term “accident”

Discussion:

Repetitive trauma claims have the potential to unravel the entire workers’ compensation system as they go beyond the scope and intention of the original Workers’ Compensation Act. The interpretation of “accident” has been broadened, liberalized, and expanded to include many conditions that occur over time from the normal human aging process. The law may have to be totally rewritten to provide a narrow compensability definition that limits the potential for abuse. The employee treating physician should have to show work was the “prevailing factor” in causing the medical condition and the impairment.

Recommendation:

There needs to be a clear definition of an accident. An accident should be a traumatic event or unusual strain identifiable by time and place of occurrence caused by a specific event during a single work shift. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by normal activities of day-to-day living should not be compensable. The law should state that this definition is to be strictly construed.

Further:

- Create a new statute with specific requirements for proving a repetitive or cumulative trauma injury, similar to the hernia statute.
- Eliminate degenerative and arthritic conditions, like the effects of aging and ordinary conditions to which the general public is equally exposed, from the system, with specific exclusions under a new “repetitive trauma” statute, already excluded from the occupational disease statute.
- Establish statute of limitations of within two years of the last injurious exposure for such claims.
- Require notice within 90 days of last injurious exposure or date of diagnosis, whichever is earlier.
- Require expert medical opinion, to a reasonable degree of medical certainty, to establish causation in repetitive trauma claim.

Legal Committee

Issue:

Expand ethics rules to require disclosure of all income derived from legislators in the workers' compensation system

Discussion:

This issue arises because legislators, as attorneys, argue cases before the Workers' Compensation Commission. Because legislators vote on appointment of commissioners, there could be a perceived conflict of interest.

Recommendation:

Refer issue to Senate Ethics Committee.

Issue:

Limiting attorney involvement

Discussion:

The South Carolina Workers' Compensation Act was intended to provide a "no fault" system. Because of recent court rulings and commission practices, that system has eroded to attorney involvement on both sides as the norm.

Recommendation:

- Encourage consumer "friendliness" at the commission.
 - a. Create a neutral "ombudsman" position.
 - b. Establish a public information telephone help line.
 - c. Publish brochures on procedures and the law.
- Discourage frivolous proceedings.
 - a. Create regulations to sanction frivolous/unsupported claims.
 - b. Fund commission to allow for better oversight of attorney fee petitions.
 - c. Codify penalties for attempted fraud.
- Limit contingent fees for attorneys.
 - a. Comports with the act's purpose of preventing disabled workers from becoming wards of the state.
 - b. Rationale for traditional contingent fee arrangements not applicable in workers' compensation context because system is no-fault, fast-paced, and involves little capital investment/risk.
 1. Limit contingent fees to a \$10,000 maximum.
 2. Examine a "stepped" approach to contingent fees (e.g., 15 percent for admitted cases; 20 percent for denied cases or cases appealed).
 3. Recommend looking into other states that have recently addressed the issue.

Issue:

Brown v. Bi-Lo

Discussion:

The Supreme Court's decision in *Brown v. Bi-Lo* limits communication between health care providers and a carrier, employer, or their representatives to written reports only unless the defendants to the workers' compensation have obtained a written authorization from the employee. Such authorizations can be, and often are, revoked by the employee on advice of his or her attorney. This can make it necessary for the carrier or employer to take depositions from the treating physicians in order to obtain information necessary to the defense of the claim. Such depositions add to the costs of defending the claim.

The decision in *Brown v. Bi-Lo* can escalate the costs of claims by complicating and delaying an injured employee's return to work. Prolonging the period of disability not only increases the amount of benefits that must be paid, it also can reduce the employee's rehabilitation because it has been proven that the sooner an employee can get back to some form of work, the more likely that efforts toward rehabilitating that employee will succeed. Employers, however, are often reluctant to re-assign a worker on disability until they receive a thorough description of what the employee can or can not do within his or her restrictions. Without unimpeded communication with the treating physician, employers are often inclined to wait until an employee is given a full release by the treating physician before reassigning an employee to duty. This can extend the period of disability and prolong recovery, thereby working to the detriment of the employer and the employee alike.

Recommendation:

- Provide statutory redress of overly broad language in the *Brown v. Bi-Lo* case to allow for better coordination of light duty programs, medical authorizations, nurse case management, etc.
- Expand the old form 14-A, and bring it back into use.
- Establish additional discovery methods, such as interrogatories, to encourage and require exchange of information.
- Prohibit the use of "questionnaires" or signed "statements" (after depositions) by medical doctors (APA only covers actual medical records because of inherent reliability).

Issue:

Tiller v. National Healthcare (burden of proof)

Discussion:

In *Tiller*, the South Carolina Supreme Court held that a claimant is not required to provide expert witness testimony to prove causation in a medically complex case. Legislation is needed to specify that the burden of proof is upon the claimant, and that proof of causation in a medically complex case requires expert witness testimony.

Recommendation:

- Codify standard burden of proof by a preponderance of competent evidence.
- Require expert medical opinions on issues of causation, where contested, and on permanent impairment to be stated “to a reasonable degree of medical certainty.” Otherwise, awards are speculative.
- Allow for direct oversight of commission by the governor and/or commission chairperson to discourage speculative awards and ensure uniformity in decisions.

Issue:

Dodge v. Brucoli (future medical)

Discussion:

In Dodge, the South Carolina Court of Appeals held that the Workers' Compensation Commission has jurisdiction to order the payment of future medical benefits in any non-settled case when, in the judgment of the commission, such benefits would tend to reduce the claimant's disability. As a practical matter, this means that a future award of additional medical benefits is possible in any claim that is not settled by a clincher. This increases an employer and carrier's potential liability in all non-settled claims and increases the costs of clincher settlements. Legislation is needed to impose reasonable limitations on an employee's right to claim future medical benefits in all but the most serious of injury claims.

Recommendation:

- Clarify with legislation that future medical benefits are proper only in cases of permanent and total disability and for maintenance of a prosthetic device, as stated in section 42-15-60.
- Require the commission to maintain a file in all cases where future medical benefits are awarded.

Issue:

Presumption of permanent total disability where there is a 50 percent or more loss of use to the back

Discussion:

Currently, if an employee is found as a fact by the commission to have sustained a 50 percent or more loss of use of the back, that employee is conclusively presumed to be entitled to receive an award of permanent total disability. Many factors play a role in permanent and total disability. The back is the only area where this applies and is not reflective of the true disability in many cases. Employees with fifty percent disability to the back are able to do many jobs without receiving a decision of permanent and total disability.

Recommendation:

Repeal that portion of Section 42-9-30(19) that creates an irrefutable presumption of a permanent total disability upon a finding by the Workers' Compensation Commission of a 50 percent or more loss of use of the back.

Issue:

Mediation

Discussion:

Mediation in workers' compensation was discussed in great detail. North Carolina and a few other states have seen success with its implementation of mandatory mediation. Mediation is currently an option in South Carolina available through the current informal hearing process that is active in the state. Mediation is very effective when both sides are seeking a resolution to a claim as opposed to following a mandatory requirement placed by the Legislature.

Recommendation:

- Encourage mediation
- Consider mandatory mediation only in certain types of cases (e.g., coverage disputes, multiple beneficiaries in death cases, etc.)

Issue:

Establish apportionment guidelines for aggravations of pre-existing injuries

Discussion:

There needs to be a better system for managing the issues that surround pre-existing injuries. More definition should be offered and consistency of application followed.

Recommendation:

- Create an apportionment statute dealing with aggravations of pre-existing conditions.
- Revamp the Medical Advisory Board to help determine apportionment of liability.
- Require that the commission maintain records of all settlements and awards (amount, body part, Compensation rate) and ensure that these records are made part of any future claims and are provided to the parties.

Issue:

Codify standards for determining who is an “independent contractor”

Discussion:

In the absence of a statutory definition, a number of cases in South Carolina nonetheless define the factors considered in determining whether an individual is an “employee” or an “independent contractor.”

Recommendation:

Codify a single, standard test to determine whether an individual is an “independent contractor.” A clear standard would aid in premium audits, insurance fraud investigations, and compensability decisions.

Issue:

Amend S.C. Code Ann. 42-9-260 to require mandatory payment of temporary total disability compensation

Discussion:

Current law states that an employer “may” start temporary total disability compensation when an employee is out of work due to a reported work-related injury. It has been suggested that this law be amended to state that the employer “shall” start temporary total disability compensation and pay such compensation until an investigation reveals a good faith basis for denying further benefits.

The current workers’ compensation system places the burden of proving entitlement to benefits upon the employee. The proposed amendment would undermine this fundamental tenet of the system and create a presumption of compensability.

Incentives currently exist to encourage employers and carriers to promptly investigate claims and pay benefits when proper, including, but not limited to: reducing lost time, reducing attorney involvement, maintaining control of the medical treatment, fostering positive employer/employee relations, promoting light duty programs, and meeting OSHA requirements.

Recommendation:

S.C. Code Ann. 42-9-260 not be amended in this manner.

Issue:

Prohibition of lump sum awards in absence of unanimous agreement

Discussion:

The commission routinely grants petitions for lump sums. The burden then falls to the employer/carrier to prove prejudice in such a payment.

Despite the routine argument that a claimant may not have otherwise lived to realize the entire award, or that the claimant's condition may improve, the commission routinely awards these lump sum requests. In addition, the commission now routinely includes fictional language in these orders to suggest that the claimant's lump sum is to be "allocated" over the claimant's statutory lifetime in an effort to undermine federal social security disability law, which requires that workers' compensation benefits be offset from social security disability benefits, so a claimant does not earn more in tax-free disability benefits than the claimant was ever actually able to earn.

The payment of awards in lump sums is contrary to the purpose of replacing an injured worker's weekly wage. Lump sum awards are often depleted within a short time of the settlement. The easy availability of lump sum awards under the current system encourages attorney involvement.

Recommendation:

Abolish or significantly amend S.C. Code Ann. 42-9-301 to permit lump sum awards only in cases where there is unanimous agreement by the claimant, the employer, the carrier, and the commission.

Commission Committee

Issue:

Develop methods for oversight and accountability of commissioners

Discussion:

In South Carolina, workers' compensation commissioners are appointed by the Governor with advice and consent of the Senate. Once the commissioner's appointment is confirmed, there is no mechanism to monitor and address individual commissioner's work performance. There is a need to make sure that there is consistency within the commission as far as policies and procedures are concerned, and there must be consistency in how those policies and procedures are enforced.

Recommendation:

- Empower the Governor to remove commissioners for cause, with input from the Chair of the Commission and Advisory Committee chair.
- Empower the commission chair to manage commissioners, set operating procedures, and enforce compliance.

Issue:

Workers' compensation appeals process

Discussion:

The current operating process for workers' compensation appeals begins with a single commissioner hearing a case. If there is a disagreement with the outcome of the single commissioner's decision, then the appeal goes to a panel of other commissioners for a peer review. Having a panel of commissioners hearing each other's appeals has led to the perception that the appeals process may be biased. The appeal of the panel decision is then taken to the Circuit Court, then to the Court of Appeals, and finally to the State Supreme Court.

Recommendation:

Revise the appeals process as follows:

1. Hearing by a single commissioner
2. Appeal to a tiered commission comprised of a panel of three commissioners that only hear appeals
3. Appeal to the Administrative Law Court
4. Appeal to the Court of Appeals

The implementation of this process will require the addition of four commissioners. Three commissioners will sit on the appeal panel with the Chair of the Commission serving in a managerial role and as a replacement on the appeal panel when one of the other commissioners is unavailable. The remaining seven commissioners will continue to hear field cases.

This recommendation provides for an increase in time allowed for each hearing (in contrast to the standard 30-minute allotment) and a decrease in the length of time to get to a hearing, reducing cost to the employer/carrier. Having an appeals panel of commissioners devoted only to appeals would allow current commissioners an additional week each month to hear cases because they will no longer be required to serve on the appeals panel. This would allow the commissioners time to review and study cases, minimize the risk of future backlogs in the system, and allow the commissioners time to write decisions rather than require the "winning" attorney to write the order.

Issue:

Lowering the threshold number of employees for workers' compensation coverage

Discussion:

Discussion surrounds the question of whether reducing the number of employees needed to require workers' compensation coverage would reduce premiums for the remainder of the coverage group. The question called for the study of data on how many employers would be potentially affected and how that number would affect the overall coverage and cost of the system.

The task force believes that lowering the threshold number of employees required for mandatory workers' compensation coverage is not a major factor in the cost or efficiency of the workers' compensation system and that lowering the threshold could unintentionally raise the cost of workers' compensation insurance by increasing the number of uninsured employers.

Recommendation:

Because reliable data to review this issue fully were not available, no recommendation other than further study is suggested when meaningful data are available on this issue. This could require additional recordkeeping by the South Carolina Employment Security Commission, which does not currently keep such data but simply classifies employers with fewer than four employees in one group.

Issue:

Qualifications for commissioners

Discussion:

Currently, commissioners are appointed by the governor with the advice and consent of the Senate. This system has yielded some very competent commissioners. Once appointed, however, there are limited requirements for any continuing education or further proficiency in workers' compensation law or administrative procedures. While most of the commissioners come from a legal background, that is not a basic requirement.

Recommendations:

- Establish basic core competencies, by the commission chair, for the position of commissioner that will serve as a benchmark in the recommendation and confirmation process for new commissioners.
- Require each new commissioner to attend the National Judicial College and maintain administrative law training certification.
- Establish a continuing education system that would include update training in administrative processes and ethics (Senate Code 127).
- Institute an annual review and rating of commissioners by the South Carolina State Bar (same process as used for Circuit Court judges).

Issue:

Second Injury Fund acceptance impacting a commissioner ruling

Discussion:

The commissioner, claimant's attorney, and defense attorney have the right to know whether a case has been accepted by the Second Injury Fund. The perception exists that knowing this information sometimes alters a commissioner's ruling on a case.

Recommendation:

This recommendation requires the governor to direct the commission to disregard acceptance by the Second Injury Fund when determining awards. Further, any and all documentation should be maintained separately from the primary claim.

Issue:

Geographic location as a factor in determining awards

Discussion:

In several discussions, it has become apparent that commissioners sometimes consider geographic location as a factor in determining workers' compensation awards. While demographic issues are understood, without a common method of establishing awards, this practice is unfair.

Recommendation:

Enact legislation to establish objective standards upon which impairment determinations could be made.

Issue:

South Carolina Workers' Compensation Advisory Committee

Discussion:

The South Carolina Workers' Compensation Advisory Committee was established by statute. However, because of lack of direction or coordination and non-value-added agendas, this committee has not had the intended impact on the commission.

Recommendation:

Operate the South Carolina Workers' Compensation Advisory Committee as follows:

- Membership

Members shall be selected by the governor and shall serve staggered five-year terms. The governor shall appoint a chairperson for this committee to serve on the same two-year rotation as the chairman of the Workers' Compensation Commission.

Membership shall be made up of the following constituent base:

- Large business member
- Small business member
- Plaintiff's attorney
- Defense attorney
- Insurance carrier
- Member of self insured group
- Member of medical profession

- Ex-officio members shall include:

- Executive director of the Workers' Compensation Commission
- Director of the Department of Insurance
- Representative from the Department of Commerce
- Representative of the Department of Vocational Rehabilitation
- Other members at the discretion of the governor

- The Advisory Committee shall be responsible for establishing the reporting metrics of the South Carolina Workers' Compensation Commission. These operating metrics shall be reported to the committee by the current commission chairperson on a quarterly basis and shall be reported to the governor by the Advisory Committee chairperson on an annual basis.
- The commission chairperson shall report on any commissioner issues, including any forms of malfeasance, and shall be the commissioners' ombudsman for any commissioner issues. Upon the committee's conclusion that a commissioner is

guilty of malfeasance, the Advisory Committee chairperson shall recommend the removal of the commissioner for cause. The committee shall report to the governor and the Legislature on the performance of any commissioner nearing potential reappointment and recommend whether the individual should be reappointed to the commission.

- The commission chairperson shall bring forward any ideas or suggestions for improvement.
- The Advisory Committee shall meet with appropriate members of the House and Senate on a committed schedule to discuss workers' compensation issues.
- The Advisory Committee, with input from the commission's executive director, the commission's chairperson, and other individuals as necessary, shall draft any necessary changes to the South Carolina Workers' Compensation Act or the Regulations of the Commission.
- The Advisory Committee shall meet, at a minimum, once per quarter, and all meetings shall be open to the public. At least one month before the beginning of each year's legislative session, the Advisory Committee shall report to the governor and the Legislature the state of the Workers' Compensation Commission and South Carolina's Workers' Compensation system and recommend any changes the committee deems necessary to improve the system.
- The Advisory Committee shall have the power to issue subpoenas, take testimony, administer oaths, require the production of documents, and solicit and receive all appropriate advice for accomplishing their mission of improving South Carolina's Workers' Compensation system and the Workers' Compensation Commission.

Issue:

South Carolina Second Injury Fund

Discussion:

The Second Injury Fund must be abolished in an orderly fashion. The fund was created to serve a noble purpose and has served that purpose well. However, with the passing of the Americans with Disabilities Act which made it illegal to discriminate against any disability, that need has passed. The Second Injury Fund no longer serves its intended purpose and does not fairly represent all businesses in South Carolina. In 2004, of the 98,000 employers in the state, only 2,000 received any benefits from the fund.

The Second Injury Fund mechanism adds unnecessary frictional costs to the workers' compensation system. The fund itself spends \$1,600,000 to administer. Carriers have to create their own internal structures to administer Second Injury Fund reimbursements or pay third party vendors to do the same, all adding unnecessary costs to an already burdened system.

Benefits paid to injured employees are not impacted by the Second Injury Fund., although there is anecdotal evidence that awards are higher because of the perception by the commissioners that Second Injury Fund is "free" money.

Employers' "Mods" are insignificantly impacted by Second Injury Fund recoveries.

Carriers have left the state and new carriers don't come into the state because of the huge Second Injury Fund assessments, making South Carolina a less competitive marketplace.

Assessments, although paid by carriers, are ultimately passed on to the consumer. In this case the consumer is the employers of South Carolina. This adds to the uncompetitive business climate in South Carolina. 98,000 employers, many of them small businesses, are subsidizing 2,000 employers, many of which are large businesses.

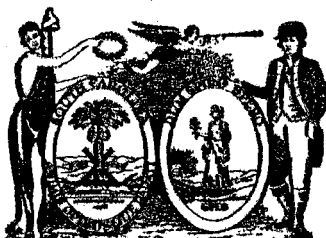
Recommendation:

The Second Injury Fund no longer serves its intended purpose and does not fairly represent all businesses in South Carolina. The task force recommends the orderly dissolution of the Second Injury Fund.

Appendices

Appendix A. Executive Order

State of South Carolina
Executive Department
Office of the Governor



Executive Order 2005-16

WHEREAS, the economic health and vitality of South Carolina is an area of great importance to all South Carolinians; and

WHEREAS, the successful and effective operation of South Carolina's Workers' Compensation system has a direct effect on the ability of employers and workers to thrive and prosper and thereby enhances the economic health of this state; and

WHEREAS, current and impending concerns facing the Workers' Compensation system such as continual rising premiums, the need for review of current laws and the claims review process, and the need for overall improvement in the system necessitate a thorough examination of the Workers' Compensation system; and

WHEREAS, Workers' Compensation reform is necessary to ensure the economic health and development of South Carolina.

NOW, THEREFORE, I do hereby establish the Governor's Workers' Compensation Reform Task Force (the "Task Force").

1. The Task Force shall make recommendations to improve the overall system of Workers' Compensation and shall study areas of concern to include, but not be limited to:
 - a. the dramatic rise of Workers' Compensation premiums;
 - b. the current awards review process;
 - c. the current decision and appeals process;
 - d. the service delivery and data collection operation utilized by the South Carolina Workers' Compensation Commission; and
 - e. the current oversight of the Workers' Compensation system to include a review of the existing Workers' Compensation Advisory Committee created pursuant to Section 42-3-1 20 of the South Carolina Code of Laws.
2. The Task Force shall be comprised of business representatives, attorneys, insurance industry representatives, and physicians.


3. The Task Force shall be authorized in the furtherance of its mission to hold public hearings and take such other actions as it deems necessary and advisable.

4. The Task Force shall identify reforms and policy recommendations in a final report to the Governor by no later than January 1, 2006.


5. The Governor's Office, the Department of Commerce and the Department of Insurance shall provide staff support as necessary to assist the Task Force in carrying out the directives of this Executive Order.

This Order shall take effect immediately.

**GIVEN UNDER MY HAND AND THE
GREAT SEAL OF THE STATE OF
SOUTH CAROLINA, THIS 26 DAY
OF JULY 2005.**



MARK SANFORD
Governor

ATTEST: 

MARK HAMMOND
Secretary of State

Appendix B.

List of Initial Issues

Insurance

- Fraud
- In-state versus out-of-state adjusters
- Assigned risk pool rates versus voluntary rates
- Regulation of insurance company lost cost multiplier
- National Council on Compensation Insurance (NCCI) and its continuance as South Carolina's rating agency
- Advisory committee for the Department of Insurance
- Trained mediators on cases
- Incentives for employers who maintain safe work environments

Medical

- Mental stress disorder (standard of proof in mental stress claims)
- Make medical staff more responsive to insurance companies
- Medical utilization
- American Medical Association guidelines
- Outpatient fee schedules
- Inpatient fee schedules
- Pharmacy fee schedules
- Fee schedules and Medicare changes
- Return use of Form 14-A
- Termination of benefits when Maximum Medical Improvement (MMI) is reached
- Process review of out-of-state medical providers
- Incorporation of managed care provisions
- Repetitive trauma

Legal

- Orderly dissolution of Second Injury Fund
- Attorney involvement
- *Brown v. Bi-lo*
- *Tiller v. National Healthcare*
- Reverse *Dodge v. Brucoli*
- Attorney fee schedules
- Contingency caps
- Illegal alien issues
- Definition of cumulative/repetitive trauma
- Presumption of total permanent disability of the back, when loss of use is greater than 50 percent

- Definition of subcontractor
- Workers' Compensation Commission Oversight Committee
- Commission awards standards
- Number of employees covered by workers' compensation
- Independent contractor definition
- Impairment versus disability
- Elimination of lawyers and/or legislators bringing cases before the Workers' Compensation Commission
- Definition of "accident"
- Definition of aggravation of pre-existing diseases
- Statute of limitations for reporting injuries
- Award limits based on injuries
- Limitation of number of visits for physical therapy, acupuncture therapy, and chiropractic therapy

Commission

- Advisory Oversight Committee
- Commissioner qualifications
- Enforcement of award limits
- Rapid movement to Maximum Medical Improvement (MMI) benefit
- Impairment ratings limited to AMA guidelines
- Commission application of 42-9-30 schedule of benefits
- Lifetime medical benefit awards
- Use of administrative law judge
- Fraud claims prosecution
- Encouragement for returning to work
- Commission assistance in circumventing federal Social Security offsets against workers' compensation.
- Incentives for early return to work
- Commission rating consistency
- Definition of "compensable accident"
- Mediation in all contested cases
- Personal (permanent) impairment claim limits
- Commission claim data form analysis
- Commission staffing
- Workers' Compensation Commission funding issues
- Commission computer equipment
- Claim appeal process
- Hearing time frame
- Commission backlog

Appendix C.

Worker's Compensation in South Carolina

Our Vision: To be the driving force in a workers' compensation system of excellence that delivers superior service to employers and their workers, thereby enhancing economic development in South Carolina.

Our Mission: To provide an equitable and timely system of benefits to injured workers and employers in the most responsive, accurate and reliable manner possible.

What is workers' compensation?

Workers' compensation in South Carolina is a system created and regulated by state law. This law requires most employers to obtain insurance or to be responsibly self-insured for purposes of providing benefits to employees injured at work. Benefits may include payment of medical bills, lost wages, and awards for permanent disability and scarring. (Workers' compensation also covers treatment for occupational diseases if caused by conditions of employment.)

Dependants of employees who die as a result of work-related accidents or occupational diseases may be eligible for benefits.

What is covered by the law?

Employees of private industry and state and local government are covered. Full-time and part-time employees and minors are covered. So are employees of charitable organizations. In general, any employer with four or more employees is required to have Workers' Compensation insurance. There are certain exceptions.

What is the purpose of the South Carolina Workers' Compensation Commission?

The commission is a state agency that enforces the workers' compensation laws enacted by the Legislature. The commission also resolves disputes between you and the employer's insurance representative. (Seven commissioners, who are appointed by the governor, are responsible for conducting informal conferences, hearings, and appeals and for approving settlements. Commissioners also are responsible for the agency's administration and operations in their capacity as its governing board.)

How do I report an on-the-job injury?

Report all injuries at work to your employer immediately and request medical treatment, if needed. Failure to give notice to your employer within 90 days after an accident may deprive you of the right to compensation.

You must file your claim for benefits within two years after the accident or benefits may no longer be available. In the event of accidental death, the worker's dependents, or parents if there are no dependents, must file a claim within two years of the date of the death.

When is a claim reported to the commission?

Your employer or its insurance representative must report your claim to the Workers' Compensation Commission if your medical treatment totals \$2,500 or more, if the claim is denied by the employer or employer's insurance representative, if you are out of work more than seven calendar days, if there is permanent impairment, or if you have a non-surgical scar or serious burn.

Minor claims are the direct responsibility of either the employer or insurance representative.

How do I file a claim?

Generally, reporting your accident to your employer will serve to file your claim. However, you may personally file a claim if your employer does not report your accident, denies your injury by accident, or if you believe you did not receive all your benefits.

What about medical treatment?

You are entitled to all necessary medical treatment, which tends to lessen your period of disability, including surgical, hospitalization, medical supplies, prosthetic devices, and reimbursement for prescriptions. You must go to the doctor chosen by your employer or its insurance representative.

How is the compensation rate determined?

You are entitled to Compensation at the rate of $66 \frac{2}{3}$ percent of your average weekly wage, based on the four quarters prior to your injury but no more than the maximum average weekly wage determined each year by the South Carolina Employment Security Commission. Within 30 days of compensation starting, you should receive a Form 20, (statement of earnings of injured worker), that will show your average weekly wage and compensation rate. If you disagree with the compensation rate, notify the employer's insurance representative.

Will I get compensated for missing time from work because of my injury?

There is a seven-day waiting period before benefits can be paid. If you are out of work for more than seven days, payments will come from your employer's insurance representative. If you are out of work for more than 14 days, you will receive compensation for the first seven days.

Payments should be made directly to you and should continue until the doctor releases you to return to work. You should receive Form 15 (temporary compensation report) with your first check.

When are my benefits terminated?

After the doctor releases you to return to work with or without restrictions, within 150 days of notification of accident, you should receive two copies of the Form 15 with section II completed, indicating that compensation has been stopped and for what reasons. If the insurance carrier stops your compensation, and if you disagree, complete section III of the Form 15 and send the Form 15 to the commission's Judicial Department. This is your way to request a hearing to be held in 60 days.

If the doctor releases you to return to work after the 150-day notification period, your employer or insurance representative will ask you to sign a Form 17 (receipt of Compensation) after you have been back to work for 15 days.

What if the doctor releases me to light duty?

You must accept light work if it's offered. If you do not accept, all compensation may cease as long as you refuse to return to work. You have a right to a hearing if you believe that you are not able to do the work assigned to you.

If you return to light work before you are fully dismissed by the doctor at a wage less than you were earning at the time of your original injury, you are entitled to weekly compensation at the rate of the $66 \frac{2}{3}$ percent of the difference between your average weekly wage and your new wage.

What if I receive an impairment rating or have a scar?

When the doctor releases you with an impairment rating or if you have a non-surgical scar that can be seen at least eight feet away, the insurance carrier will request an informal conference/viewing. This is an opportunity for you to meet with a representative from the commission and the insurance carrier to determine the amount of compensation due.

What is a hearing?

The workers' compensation commissioners conduct a hearing to resolve disputes between you and your employer's representative. You may apply for a hearing if your employer does not report your accident, denies your injury by accident, or if you believe that you did not receive all your benefits.

Can I appeal a commissioner's decision?

After a decision and order have been issued by a commissioner, if either party disagrees with the decision, they have 14 days to file an appeal to be heard by a panel of commissioners.

After a decision and order have been issued by the panel of commissioners, if either party disagrees, they have 30 days to appeal to the Circuit Court. Decisions of the Circuit Court may be appealed to the South Carolina Supreme Court.